488-CS Document 52 Filed 12/13/11 Page 1 of 6





Page 1 of 2

The Hon. Cathy Seibel, United States District Judge The Hon. Charles L. Brieant Jr., U.S. Courthouse Courtroom 218 300 Quarropas Street White Plains, New York 10601-4150

USDCNONY December	8, 201
<b>DOCUMENT</b>	
ELECTRONICALLY FILED	
DOC #:	
DATE FILED: 12 3201	

RE: 09-CV-10488 (CS)Creative Arts by Calloway, LLC v. Christopher Brooks. d/b/a The Cab Calloway Orchestra DEFENDANT COURT REQUEST COMPLIANCE

## Dear Judge Seibel:

I have just yesterday received transcripts of oral arguments of Nov. 21, 2011. It is clear therein that this Court requested Defendant clarification that Plaintiff's alleged business of "a possible dramatic musical play," and allegedly related "licensing," was before Judge Brieant in 2001. In compliance with the Court's aforementioned request, attached are pages 5-7 of oral arguments before Judge Brieant, made directly to this District on Nov. 16, 2001. Page 6 states:

- 6 MR. KARLIN[2001]: She has assumed licenses. She's in the
- process of negotiating further licenses currently. Since this
- motion was filed, almost six months ago, she has -- excuse me.
- The corporate entity, which is now the successor in interest
- 10 to Mrs. Calloway, is negotiating further recording contracts,
- 11 further entertainment services, theatrical presentations, et
- 12 cetera. [Emphasis added.]
- 13 THE COURT: "Et cetera" doesn't cut it around here.1

Plaintiff's bald claim of "successor in interest," status is insufficient under 15 USC §1060, which requires proof of "successor-in-business," ongoing and existing. In addition to the District's past consideration of alleged "theatrical presentations," Plaintiff's 2001 oral arguments p.5-7, alleged broad "licensing," "merchandising," and "television" business use.

The record is indisputable that neither Plaintiff nor it's assignor had used the pertaining mark in ongoing or existing business as of Plaintiff's declaration of full submission of all evidence. In final oral arguments of Nov 16, 2001 p.3 ln. 1-5, Defendant's attorney Ms. Solomon testified,

"We took a deposition of the plaintiff by her representative. There is no other evidence. When we asked them during the deposition what else is there that you have to support your claim that Cab Calloway functions as a trademark, they had nothing else."

<sup>1</sup> Calloway I held, "Plaintiff has failed to present any evidence which would justify a finding by a trier of the fact that it or its assignors owned or used any commonlaw service mark at the time this case was filed." [Emphasis added.] Plaintiff never used the mark, or owned the mark.

Page 2 of 2



Plaintiff then affirmed that its record was complete in the same Nov. 16, 2001 hearing, testifying that *all* Plaintiff evidence of alleged business use was completed and on the record, "It's all in the papers your Honor." p.7, ln. 22, 23. This District thereupon declared as of Nov. 16, 2001 all evidence as "Fully submitted, decision reserved." on p.15, ln. 16. There is thus no remaining evidence of use, or genuine issue of material fact as to Plaintiff's invalid assignment.

In 2001, this District examined Plaintiff's recently attached assignment papers and ruled that they failed to prove any ongoing or existing business. 15 USC §1060 makes clear that, in the case of ITU applicants, assignee and assignor business must exist at common law to validate assignment of rights in a mark. 15 USC §1060 bars ITU applicants from naked assignment of unrealized business "intentions." The alleged assignment was invalid, therefore under 15 USC §1060(a)(1), the subject ITU application is void. Defendant respectfully moves this Court so rule.

Respectfully submitted.

Christopher Brooks – Defendant Pro-se

## 

01 Civ. 3192(CLB)

November 16, 2001 10:00 a.m.

Before: THE HONORABLE CHARLES L. BRIEANT, District Judge

p. 5

- 1 MR. KARLIN: Of course, I completely disagree, your
- 2 Honor.
- 3 THE COURT: I think you should use the lectern.
- 4 That's my practice.
- 5 I just wanted to find out background information.
- 6 MR. KARLIN: Yes, my client does have an application
- 7 pending. We will be revising an amended application
- 8 appropriately. My point is, your Honor --
- 9 THE COURT: Well, you have no certificate.
- 10 MR. KARLIN: No. But under common law --
- 11 THE COURT: What use did your client make of this
- 12 name?
- 13 MR. KARLIN: My client receives recording royalties,
- 14 is engaged in licensing.
- 15 THE COURT: She would have received the recording
- 16 royalties in all events once she became the residuary legatee
- 17 of Mr. Calloway.
- 18 MR. KARLIN: Yes, sir.
- 19 THE COURT: That wasn't use of a service mark by her.
- MR. KARLIN: Well, your Honor, there is case law,
- 21 which is in my papers before the Court, that this Court has
- 22 ruled that receipt of recording royalties is use of a service
- 23 mark. Now, obviously, defendant disagrees with that.
- 24 THE COURT: They would have had to pay the service
- 25 mark to anybody, to a bank or any charity or anybody who owned

TRI-STAR REPORTING SERVICE

(212) 922-9144

## 

01 Civ. 3192(CLB)

November 16, 2001 10:00 a.m.

Before: THE HONORABLE CHARLES L. BRIEANT, District Judge

p. 6

- 1 the rights.
- MR. KARLIN: There was also merchandising licensing,
- 3 your Honor, and -- I appreciate that. Let me go back to the
- 4 recording royalties issue, your Honor.
- 5 THE COURT: She did actually license merchandise?
- 6 MR. KARLIN: She has assumed licenses. She's in the
- 7 process of negotiating further licenses currently. Since this
- 8 motion was filed, almost six months ago, she has -- excuse me.
- 9 The corporate entity, which is now the successor in interest
- 10 to Mrs. Calloway, is negotiating further recording contracts,
- 11 further entertainment services, theatrical presentations, et
- 12 cetera.
- 13 THE COURT: "Et cetera" doesn't cut it around here.
- 14 MR. KARLIN: I understand that, your Honor. And if
- 15 you want, I will submit, since this motion was filed, nearly
- 16 six months ago --
- 17 THE COURT: You know about the Navy? The Navy has an
- 18 expression. The expression is: "It didn't happen on my
- 19 watch." So don't give me that. I don't want to hear that.
- MR. KARLIN: I won't, your Honor.
- 21 THE COURT: If the facts are not up to date and you
- 22 want to file additional papers, we'll discuss that and hear
- 23 what your adversary has to say. And if you're claiming the
- 24 papers are stale, that's a different issue.
- 25 MR. KARLIN: Well, your Honor, things have occurred

Т

TRI-STAR REPORTING SERVICE

(212) 922-9144

## 

01 Civ. 3192 (CLB)

November 16, 2001 10:00 a.m.

Before: THE HONORABLE CHARLES L. BRIEANT, District Judge

p. 7

- 1 in the six months since these papers were filed. And that's
- 2 no fault of mine, nor my client's. If the Court would like an
- 3 update --
- 4 THE COURT: Should the rights of the parties be
- 5 determined as of the date the litigation was brought?
- 6 MR. KARLIN: Yes, sir.
- 7 THE COURT: Can you go sue somebody and then go
- 8 perfect a mark afterwards?
- 9 MR. KARLIN: No, sir. And our position is that when
- 10 this action was filed, we had an actionable right, a common
- 11 law service mark in the name Cab Calloway. The decisional
- 12 authority of this Court --
- 13 THE COURT: All she did to use that service mark was
- 14 to collect mechanical royalties and sue people who were using
- 15 the mark.
- MR. KARLIN: Well, your Honor, she also was involved
- 17 in litigation for five years after Mr. Calloway's death that
- 18 ended in a settlement. These parties, for which is
- 19 Mr. Calloway's whole history of litigation, used his mark.
- 20 They received royalties. They engaged in merchandising.
- 21 Mrs. Calloway, in September 2000, was assigned all right title
- 22 and interest that these third parties had in that. It's all
- 23 in the papers, your Honor.
- 24 THE COURT: Well, all right. I'm a little doubtful
- 25 as to whether your record is adequate or whether you have any

P. 8

1 triable issues of fact.

TRI-STAR REPORTING SERVICE

(212) 922-9144

UNITED STATES DISTRICT COURT		
SOUTHERN DISTRICT OF NEW YORK	1	
- Sould the court of	d. V.	
(In the space above enter the full name(s) of the plaintiff(s)/petition	er(s).) <u>Oj</u> Civ. 10488(C) (S)	
- against -	AFFIRMATION OF SERVICE	
Ba Copy Jechovico		
	<del></del>	
(In the space above enter the full name(s) of the defendant(s)/respo	indent(s).)	
1, <u>handon o 3.00 is</u>	declare under penalty of perjury that I have	
served a copy of the attached	<u> </u>	
(document you are serving)		
upon 11/M/L /LM/1/2	whose address is	
(name of person served)		
(where you served document)		
by The Simile		
(how you served document: For example - personal delivery, mail, overnight express, etc.)		
Dated: Ohm (state)	mit de	
(month) (day) (year)	20 15. 16in 57-221)	
	Address, City, State	
	Zip Code	
	Telephone Number	